

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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THE PENSION COMMITTEE OF THE	:
UNIVERSITY OF MONTREAL PENSION	:
PLAN, <i>et al.</i> ,	:
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Plaintiffs,	:
	:
- against -	:
	:
BANC OF AMERICA SECURITIES, LLC,	:
CITCO FUND SERVICES (CURACAO) N.V.,	:
THE CITCO GROUP LIMITED,	:
INTERNATIONAL FUND SERVICES	:
(IRELAND) LIMITED,	:
PRICEWATERHOUSECOOPERS	:
(NETHERLANDSANTILLES), JOHN W.	:
BENDALL, JR., RICHARD GEIST, ANTHONY	:
STOCKS, KIERAN CONROY, and DECLAN	:
QUILLIGAN,	:
	:
Defendants.	:
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**MEMORANDUM OF LAW OF CITCO FUND SERVICES (CURACAO), N.V.,
KIERAN CONROY, AND DECLAN QUILLIGAN REGARDING THE
APPLICATION OF CPLR § 214(4)'s THREE-YEAR STATUTE OF LIMITATIONS
TO PLAINTIFFS' NEGLIGENT MISREPRESENTATION CLAIMS**

Citco Fund Services (Curacao), N.V., Kieran Conroy, and Declan Quilligan (the “Citco Defendants”) hereby submit this memorandum of law on the application of CPLR § 214(4)’s three-year statute of limitations to plaintiffs’ negligent misrepresentation claims.

ARGUMENT

The appropriate statute of limitations for plaintiffs’ non fraud-based negligent misrepresentation claims is the three year period for “injury to property” mandated by CPLR § 214(4). That is because all of the negligent misrepresentation claims to which the Citco Defendants seek to apply CPLR §214(4)’s three-year statute of limitations relate to investments for which plaintiffs’ fraud-based claims (section 10(b), common law fraud, breach of fiduciary duty, and aiding and abetting) have been dismissed on the merits.

This Court, in *Fromer v. Yogel*, 50 F. Supp. 2d 227, 242 (S.D.N.Y. 1999), observed that where a claim for fraud has not been stated, the statute of limitations for a negligent misrepresentation claim is three years, and not the six years as provided by CPLR § 213(8) for “an action based upon fraud.” In *Fromer*, plaintiffs asserted claims for both common law fraud and negligent misrepresentation. On a motion to dismiss, this Court found that plaintiffs had stated a claim for fraud. *Id.* Based on this ruling, the Court applied CPLR § 213(8)’s six-year statute of limitations to the companion negligent misrepresentation claim, but cautioned: ***“This holding is limited to those instances where negligent misrepresentation is alleged according to facts that also state a cause of action for fraud.”*** *Id.* (Emphasis added). The Court added, citing *Ambassador Insurance Co. v. Euclid Services Inc.*, No. 80 Civ. 1235, 1984 WL 341, n.7 (S.D.N.Y. May 24, 1984), that “were the charge of negligent misrepresentation viewed strictly in terms of negligence, the claim would be time barred by the three-year limitations period provided in CPLR § 214(4).” *Fromer*, 50 F. Supp. 2d at 242.

Fromer, and its distinction between the statute of limitations for non fraud-based and fraud-based negligent misrepresentation claims, is still good law today. Courts in New York have consistently applied the three-year statute of limitations of CPLR § 214(4) when the facts upon which a negligent misrepresentation claim is based do not state a claim for fraud. *See HSBC Bank USA v. Bond, Schoeneck & King, PLLC*, 16 Misc. 3d 813, 833, 838 N.Y.S.2d 419, 435 (Sup. Ct. Erie County 2007) (in reliance on *Fromer*, applying the three-year statute of limitations to negligent misrepresentation claims because “[t]here have been no allegations remotely sounding in fraud” and the misrepresentations were not “intentional misrepresentations”); *see also Momentive Performance Materials USA, Inc. v. Astrocosmos Metallurgical, Inc.*, 659 F. Supp. 2d 332, 345 (N.D.N.Y. 2009) (where plaintiff alleged no fraud claims, applying the three-year statute of limitations to the negligent misrepresentation claims because they sounded in negligence); *IT Corp. v. Ecology & Env’tl. Eng’g, P.C.*, 275 A.D.2d 958, 959, 713 N.Y.S.2d 633, 635 (4th Dep’t 2000) (applying the three-year statute of limitations to the negligent misrepresentation claim because there were no allegations “that defendant acted fraudulently or in bad faith” in making its misrepresentations); *Fleet Factors Corp. v. Werblin*, 114 A.D.2d 996, 997, 495 N.Y.S.2d 434 (2d Dep’t 1985) (dismissing the fraud claim and applying the three-year statute of limitations to the negligent misrepresentation claim); *Ruach Chaim Instit. v. Shteierman*, 20 Misc. 3d 1132(A), 872 N.Y.S.2d 693, 693 (Sup. Ct. Kings County 2008) (where plaintiff alleged no fraud claim, applying the three-year statute of limitations to the negligent misrepresentation claim).

Further, consistent with *Fromer*, New York courts have applied the six-year fraud statute of limitations to negligent misrepresentation claims when plaintiffs have pled sufficient facts to sustain a fraud cause of action. *Von Hoffman v. Prudential Ins. Co.*, 202 F. Supp. 2d 252, 262

(S.D.N.Y. 2002) (holding that a reasonable jury could find facts to support a fraud claim and that a negligent misrepresentation claim based on the same facts as the fraud claim is governed by the six-year statute of limitations); *Pereira v. Centel Corp. (In re Argo Commc'ns Corp.)*, 134 B.R. 776, 796 (S.D.N.Y. 1991) (applying six-year statute of limitations to negligent misrepresentation claims but noting that its holding was limited to situations where negligent misrepresentation is alleged according to facts that also state a cause of action for fraud).

In this case, the Court held that the plaintiffs failed to state a claim for fraud with respect to investments made prior to June 2001. *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc. of Am. Sec., LLC*, 592 F. Supp. 2d 608, 628-29, 639, 642 (S.D.N.Y. 2009). Thus, with respect to plaintiffs' claims for negligent misrepresentation based on pre-June 2001 investments, there is no concomitant claim for fraud, and the three-year statute of limitations clearly applies to those claims. To hold otherwise would be to ignore the plain wording of CPLR § 213(8), which provides that the six-year statute of limitations applies only to "an action based upon fraud." Indeed, we are aware of no post-*Fromer* case in which a New York court, after dismissing fraud-based claims on the merits, applied the six-year fraud statute of limitations of CPLR §213(8) to negligent misrepresentation claims that relied on the same facts as the dismissed fraud claims. Because the facts supporting the pre-June 2001 negligent misrepresentation claims do not state a cause of action for fraud, those claims should be governed by the three-year limitations period of CPLR § 214(4).

CONCLUSION

For the foregoing reasons, CPLR 214(4)'s three-year statute of limitations applies to plaintiffs' negligent misrepresentation claims relating to investments made prior to June 2001.

Dated: March 4, 2010

Respectfully submitted,

By: /s/ Lewis N. Brown
Lewis N. Brown
Dyanne E. Feinberg
Terence M. Mullen
Elizabeth A. Izquierdo
GILBRIDE, HELLER & BROWN, P.A.
One Biscayne Tower, 15th Floor
2 South Biscayne Blvd.
Miami, FL 33131
Tel: 305-358-3580
Fax: 305-374-1756

Eliot Lauer (EL 5590)
Michael Moscato (MM 6321)
**CURTIS, MALLET-PREVOST, COLT
& MOSLE LLP**
101 Park Avenue
New York, NY 10178
Tel: 212-696-6000
Fax: 212-697-1559

*Attorneys for Defendants The Citco Group Limited,
Citco Fund Services (Curacao) N.V., Kieran
Conroy, and Declan Quilligan*